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## MARC JONATHAN DANIEL

**v.**

## IMEJ PARKING SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: R1-12B-581-10-2012]
27 JANUARY 2014

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***TORT:*** *Negligence - Damages - Damage to plaintiff's car - Valet parking services provided by defendant - Damage caused by negligent act of defendant - Water seeped into car causing damage to intricate electronic system - Evidence by plaintiff's mechanic - Whether reliable - Whether damage caused by water seepage - Whether proved - Failure to produce*

D

*specialist report - Whether there was necessity to call specialist in automative field - Whether damages awarded to plaintiff*

E

On 21 May 2011, the plaintiff visited the Great Eastern Mall ('mall') and used the valet parking services provided by the defendant. The plaintiff gave his car, a Porsche Boxster ('the car') which had a soft roof top to the car jockey at about 6pm. There was a heavy down pour on the day of incident. When the plaintiff asked for the return of his car, the car jockey could not ignite the car. A suit was filed in the Sessions Court and the plaintiff

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contended that the defendant was negligent in parking the plaintiff's car which caused water to seep into the car resulting in damage to the intricate electronic system. In dismissing the plaintiff's claim, the learned trial judge found that the plaintiff had failed to prove that the rain water seeped into the car. *Vide* this

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appeal, the plaintiff alleged, *inter alia*, that (i) the trial judge failed to consider the evidence of the plaintiff's mechanic ('SP1') regarding the cause of damage to the car; (ii) the trial judge erred in her findings that there ought to be a specialist report in the automotive field to testify about the soft top of the car; and

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(iii) the trial judge failed to make an assessment on the general and special damages.

**Held (allowing plaintiff's claim with costs):**

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**(1)** The car was parked at the entrance of the mall where there was a gush of water measuring about two to three feet in diameter which fell onto the soft roof top of the car. There

was evidence from SP1 that the damage to the car was due to the water seepage which caused a short circuit of the electronic system. This evidence was not challenged. (paras 8 & 13)

**(2)** As it was not put to the plaintiff during cross-examination as to why a specialist was not engaged to render an opinion as to the cause of damage, the defendant was estopped from arguing the point. There was no necessity to call a specialist in the automotive field. Although SP1 was not an expert in the strict sense, the court was entitled to rely on his evidence as he was competent to give his views. SP1 had experience in repairing Porsche cars and had repaired the plaintiff's car on previous occasions. (paras 21-23)

**(3)** The plaintiff's claim for costs of repairs to the car was allowed in the sum of RM22,364.32. As for the loss of use of the car for 39 days, the sum of RM6,300 was allowed. The plaintiff suffered some inconveniences for which the sum of RM7,000 was allowed as general damages. (paras 31 & 32)

**Case(s) referred to:**

*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA* ***(refd)***

*Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681 HC* ***(refd)***

*Chan Sau Chuan v. Choi Kong Chaw & Yap Yun Chan [1991] 1 CLJ 297; [1991] 2 CLJ (Rep) 394 HC* ***(refd)***

*Malaysian Airline System Bhd v. Tam Chin Siong & Ors [2009] 9 CLJ 435 HC* ***(refd)***

**Other source(s) referred to:**

*Sarkar on Evidence*, 13th end, p 521

*For the appellant/plaintiff - Gurmukh Singh; M/s Isharidah, Ho, Chong & Menon*

*For the respondent/defendant - Barvina Punnusamy; M/s Jayadeep Hari & Jamil*

*[Appeal from Sessions Court, Kuala Lumpur; Summons No: 52-19454-05-2012]*

*Reported by Kumitha Abd Majid*

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## JUDGMENT

**Lau Bee Lan J:**

**[1]** The appellant/plaintiff ("the plaintiff") has appealed against the decision of the learned Sessions Court Judge ("the SCJ") in dismissing the plaintiff's claim against the car park management company, the respondent/defendant ("the defendant").

**[2]** Essentially the plaintiff's claim against the defendant is for special damages of RM30,164.32, general damages for inconvenience ("kesusahan dan kerumitan") to be assessed and cost.

**[3]** The brief facts of the plaintiff's case are these. On 21 May 2011, the plaintiff visited the Great Eastern Mall and used the valet parking services provided by the defendant. The plaintiff gave his car, a Porsche Boxster with a soft rooftop to the car jockey at about 6pm and asked for the return of his car at about 7.30pm. There was a heavy downpour. When the plaintiff asked for the return of his car, the car jockey could not ignite the car. The plaintiff contended that due to the defendant's negligence in parking the car, the water had seeped into the car and damaged the intricate electronic system and thereby his car could not start.

**[4]** The court has considered the written submissions made on behalf of the plaintiff and defendant and the oral highlights. My findings are these.

**Findings Of The Court**

**[5]** The grounds of judgment of the learned SCJ is found at pp. 26-34 of the appeal record ("the AR").

**[6]** Based on the memorandum of appeal (pp.1-7 AR), the plaintiff contended that the learned SCJ erred in her findings on primarily the following grounds:

(a) that the plaintiff has failed to discharge the burden of proof in proving his claim;

(b) that the plaintiff has failed to prove that the rain water seeped into his car and damaged the intricate electronic system;

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(c) that although the learned SCJ agreed that the plaintiff's car was parked beneath a large gush of water 2-3 feet in diameter, she failed to appreciate the strength of "the volume" of the gush of water 2-3 feet in diameter;

(d) the learned SCJ failed to consider the evidence of SP1 regarding the cause of damage to plaintiff's car;

(e) that the plaintiff must produce an expert report and/or an expert on automotives;

(f) the learned SCJ failed to take into consideration that in cross-examination the plaintiff was not challenged to produce an expert report and/or an expert on automotives; and

(g) the learned SCJ failed to make an assessment on the general and special damages.

**Grounds a, b, c, d, f**

**[7]** The learned SCJ at p. 31 AR stated:

16. Mahkamah dapati Plaintif telah gagal untuk membuktikan bahawa air hujan yang mencurah masuk ke dalam kereta Plaintif melalui bumbung lembut itu telah merosakkan alatan dalam kereta Plaintif.

17. Mahkamah juga dapati Plaintif telah gagal membuktikan, atas kecuaian Defendan meletakkan kereta Plaintif di valet parking itu telah, menyebabkan kerosakkan kepada kereta Plaintif.

**[8]** I find the learned SCJ has erred in her finding as the evidence showed otherwise in that the plaintiff's car was parked at the entrance of the GE Mall where there was a gush of water measuring about 2-3 feet in diameter falling onto the soft rooftop of the plaintiff's car. This fact is proven by the following evidence.

**[9]** The evidence-in-chief of the plaintiff (SP2) at pp. 84-85 AR:

24. What did you see upon discovering your car?

J: I saw that the water from the roof was gushing down incessantly right into the soft top of my m/car.

25. Please describe this gush of water onto the rooftop of your m/car.

J: The gush was very heavy. The volume of water was very huge like water from a huge pipe being focused just onto the roof top.

A 26. Are you able to explain the diameter of the Gush of water that you saw pouring on the roof top of your m/car?

J: The diameter of the Gush of water could be about 2 - 3 feet wide.

B 27. Did you enquire from the Valet Staff as to why they chose to park your car at that spot?

J: Yes I did. Their reply was that there were no other places to park my car and that they would await for some other Valet guest to leave and park my car in a different place. (@ pg 84 & 85 RR).

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**[10]** The plaintiff prepared a report/sketch two days after the incident (p. 36 AR).

D **[11]** Under cross-examination, Encik Tuah bin Ibrahim, the car jockey (SD1):

S.102 : Adakah Encik tahu dimanakah Encik Rashid meletakkan kereta anak guam saya?

E J : Saya tahu, kereta itu telah diletakkan dihadapan lobi G.E. Mall.

S.103 : Di depan lobi G.E. Mall, iaitu di depan bukaan entrance G.E. Mall, betul?

F J : Betul.

S.105 : Adakah Encik telah menyaksikan air yang agak deras melimpah di penghabisan bumbung keatas kereta anak guam saya?

G J : Saya Nampak. - @ pg 24 RRT.

S.108 : Insiden berlaku pada 21 Mei 2011, saya diarahkan bahawa pihak Encik telah memaklumkan kepada anak guam saya bahawa insiden yang sama telah berlaku seminggu sebelum itu?

H J : Bukan saya yang maklumkan. - @ pg 25 RRT.

S.109 : Selain daripada tempat kereta anak guam saya telah diletakkan, adakah ada tempat lain yang berbumbung selain dari valet parking itu?

I J : Ada.

S.110 : Saya cadangkan bahawa adalah lebih selamat sekiranya kereta anak guam saya diletakkan dikawasan yang berbumbung dan insiden ini tidak akan berlaku? A

J : Tidak setuju. - @ pg.25 RRT.

**[12]** Under cross-examination, Cik Rosmawati Mohamad (SD2), the defendant's supervisor admitted that a car with a soft top, of which plaintiff's car was one ought not to be parked there: B

S.163 : Jadi pihak Jockey tidak akan meneliti dari satu kereta ke satu kereta lain, seperti kereta yang berbumbung lembut, jadi jockey tidak akan membuat pertimbangan? C

J : Tidak perlu.

S.164 : Soalan saya, jockey tidak akan membuat pertimbangan?

J : Tidak. D

S.165 : Bila ada sebuah kereta yang berbumbung lembut, dan terdapat keadaan banyak air yang turun adakah Cik akan masih bersetuju untuk meletakkan kereta di kawasan itu, atau adakah lebih baik di tempat berbumbung? E

J : Keadaan tidak pernah berlaku seperti itu.

S.166 : Seandainya ada keadaan seperti itu, air melimpah bercurah-curah, bukan kah lebih selamat atau wajar untuk kereta yang berbumbung lembut untuk diletakkan di kawasan berbumbung? F

J : Jika ada masalah itu, jadi lebih selamat untuk letak di kawasan ... KERETA MACAM ITU MEMANG TAK PATUT DILETAK DISANA. JIKA ADA BERBUMBUNG - @ pg 36 RRT. G

**[13]** Further I find there is evidence from the plaintiff's mechanic, Lee Yam Hing (SP1), the owner of LH Auto Services that the damage to the plaintiff's car due to the water seepage caused a short circuit of the electronic system. This evidence was not challenged. The evidence is as follows. H

**[14]** Evidence-in-chief:

S.11 : Adalah arahan anakguam saya, En. Marc bahawa kerosakkan yang dialami oleh system enjin/elektronik kereta ini adalah akibat peresapan air kedalam system I

kereta tersebut akibat pengaliran deras air hujan keatas bumbung "soft-top" m/kar ini. Adakah kerosakkan yang dialami consistent dengan dakwaan itu?

J : Ya. (p. 79 RR)

S.12 : Sila jelaskan bagaimana peresapan air hujan dapat menjejaskan system elektronik kereta ini. Boleh jelaskan macam mana?

J : Bila air sudah masuk, elektronik akan trouble-shooting. Dia akan menjejaskan elektronik function, tak function. (p. 3 RRT).

**[15]** Under cross-examination:

S.13 : Sebagai Mekanik, bahagian apa yang rosak didalam kereta itu?

J : Bahagian Elektronik system.

S.14 : Ada rosak bahagian enjin kereta?

J : Tidak ada.

S.15 : Encik Lee tahu tidak mengapa bahagian itu rosak?

J : Sebab sudah masuk air.
(p. 5 RRT).

**[16]** The defendant submitted that the plaintiff failed to prove "Air itu masuk dari mana memandangkan mechanic (sic) yang baiki itu (sic) sendiri tidak pasti dari mana air itu masuk. Lebih lebih lagi, beliau hanya beritahu … bahawa bahagian dalam kereta, bawah carpet dan tepi tiang sahaja basah".

**[17]** Whilst it is true that in cross-examination he was not certain where the water came from but what is important is he knew when cross-examined that the damage was caused by "Sebab ada air masuk" and the part of the car which was wet was "Dalam kereta, bawah carpet dan tepi tiang".

**[18]** The defendant submitted the water could not seep through the soft top of the plaintiff's car as if water had seeped through the canvas top, the canvas top would have been wet; SP1 did not change the canvas top as it was not damaged and it was not necessary to change.

**[19]** In my judgment this is irrelevant as there is evidence of water seepage through the soft top of the car established as alluded to above.

**Grounds e, f**

**[20]** The learned SCJ held that there ought to be a specialist report in the automotive field to testify on the soft top of the Porsche car and SP1 was not a specialist (pp. 31, 32 and 33 AR).

**[21]** With respect to the learned SCJ, she fell into error when she failed to consider all the evidence which I have stated above. Further it was not even put to the plaintiff during cross-examination as to why a specialist was not engaged to render an opinion as to the cause of damage. The defendant is estopped from arguing this point. In submission (*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639 at p. 672; [1995] 2 MLJ 770 at p. 794 F-G).

**[22]** To reiterate SP1 said that the water that had seeped through had damaged the electronic system of the car. The evidence revealed that SP1 was experienced in repairing Porsches; SP2 gave evidence he had sent his Porsche to SP1 for repairs previously and trusted SP1's competence completely and in this instance he did the repairs save for the fact when he sent the car to Singapore for "electronic programming and coding" (pp. 4-7 AR - in cross-examination).

**[23]** In my judgment there is no necessity to call a specialist in the automotive field. In any event the court is entitled to rely on the evidence of SP1 who though is not an expert in the strict sense of the word but he was competent to give his views because of his experience in repairing Porsche cars and had repaired the plaintiff's car on previous occasions. In this regard I rely on the passage from *Sarkar on Evidence* 13th edn., p. 521 cited by Lim Beng Choon J (as he then was) in *Chan Sau Chuan v. Choi Kong Chaw & Yap Yun Chan* [1991] 1 CLJ 297; [1991] 2 CLJ (Rep) 394 at p. 402.

**Ground g**

**[24]** The learned SCJ merely stated that as she did not find the defendant liable for the damage caused to the plaintiff, the issue of quantum did not arise. She did not make any provisional assessment of quantum.

**[25]** I find the plaintiff has proven his claim for the following damages. I find essentially there was not much cross-examination save for the matters I have culled out and of the sending of the car to Singapore for coding purposes because the defendant counsel was more focused on the issue of liability.

**[26]** First, the claim for the repairs of his Porsche car is evident from the testimony of SP1 that the plaintiff had paid RM22,364.32 as per the cash sale receipts exhs. P1 and P2 (pp. 1 & 2 AR No. 3), the payments of which were in three instalments:

(i) by cash deposit into his Maybank account no. 114543035686 (exh. E p. 3 AR No. 3);

(ii) CIMB cheque of RM10,000; and

(iii) Standard Chartered cheque No. 300005 of RM9,364.32.

This evidence remained unchallenged.

**[27]** Next is the plaintiff's claim for loss of use of car for 39 days. SP1 stated the car was at his workshop from 21 May 2011 and was returned to the plaintiff on 28 June 2011.

**[28]** For this 39 days of loss of car the plaintiff stated for the first ten days, he hired a taxi at RM50 a day; second ten days, he borrowed the mechanic's (SP1) car and for the remaining 19 days, he borrowed a friend's car. When cross-examined as to how he owed SP1 for the loan of the car, the plaintiff stated he has not paid SP1, "It is more of goodwill ... I have to pay something but have not paid him". During submission learned counsel for the plaintiff sought to amend the cost of loss of use of car from RM500 per day to RM200 instead of RM500 in line with the principle of duty to mitigate. Learned counsel for the plaintiff did not object stating it is up to the plaintiff to do so. Therefore for loss of use of car, I allow the plaintiff's claim RM50 x 10 days + RM200 x 10 + RM200 x 19 =RM6,300, which sum in my judgment is fair and reasonable.

**[29]** The plaintiff's claim for inconvenience is pleaded in para. 10 of the statement of claim. The plaintiff stated "Taxi's were very inconvenient and inconsistent with timing" and he was compelled to hire a car. When queried what difficulties he faced as a result of the unavailability of his car, the plaintiff who worked as a

physiotherapist, replied "Moving around" as he worked in two or three places, one in Kuchai Lama his own practice, at the Prince Court Hospital in town and one at his home in Taman Seputeh and he played golf everyday "(carrying) my golf clubs everyday using my car".

**[30]** The plaintiff submitted a claim for RM30,000 citing *Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor* [2010] 6 CLJ 681 (HC) at para. 32 p. 691 I to p. 692 A-C and *Malaysian Airline System Bhd v. Tam Chin Siong & Ors* [2009] 9 CLJ 435 (HC) para. 21.

**[31]** I am in agreement with the position stated in both these cases that damages may be claimed for discomfort, inconvenience, mental and physical distress, anxiety and severe embarrassment subject to proof. Given the testimony of the plaintiff which was unchallenged, I find he did suffer some inconveniences and I allow a sum of RM7,000 bearing in mind that he had no car with him for ten days when he hired a taxi; otherwise for the remaining 29 days he had usage of a car, *albeit* not his own.

**[32]** For all the foregoing reasons I find there are merits in the grounds of appeal submitted by the plaintiff which warrant this court to interfere with the findings of the learned SCJ. The appeal of the plaintiff is allowed with costs. Accordingly the court allows the plaintiff's claim for:

(a) costs of repairs of the Porsche car of RM22,364.32;

(b) loss of use of the car for 39 days of RM6,300;

(c) general damages for inconvenience of RM7,000; and

(d) costs of the appeal fixed at RM5,000.